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IN THE

Supreme Court of the United States

Nos. 785, 786.

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

CAPITOL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO BE NAMED A PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION AND BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO BE NAMED A PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION.

Northwest Airlines, Inc. (Northwest), the principal intervenor-respondent in the above entitled cases in the United States Court of Appeals for the Second Circuit, respectfully moves (a) to be named a party respondent to the petitions for certiorari to the United States Court of Appeals for the Second Circuit brought by Eastern Air Lines, Inc. (Eastern) and Capitol Airways, Inc. (Capitol); and (b) for leave to file the annexed brief in opposition to the petitions of Eastern and Capitol for writs of certiorari

Motion to Be Named a Party Respondent and for Leave to File Brief in Opposition

to the United States Court of Appeals for the Second Circuit.

Although it is common practice in proceedings to review actions of administrative agencies to name as respondents the parties in interest before the administrative agency as well as the agency, in the above-entitled cases only the administrative agency involved has been named a respondent. Northwest was permitted to intervene in the Court of Appeals and participated fully in the proceedings of that Court as it had before the Civil Aeronautics Board.

Northwest is the recipient of the principal route award granted in the proceedings before the Civil Aeronautics Board which petitioners seek to have reviewed, and has a vital concern in the disposition of these petitions. Northwest has been operating on that route for more than one year and has incurred substantial expenses and made substantial commitments in connection therewith.

The interest of Northwest in these proceedings is apparent. It therefore asks that it be permitted to participate fully in these proceedings as a party respondent.

Respectfully submitted,

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BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION.

Opinions Below.

The orders and opinions of the Civil Aeronautics Board in the "Great Lakes-Southeast Service Case" reviewed by the Court of Appeals below have not as yet been published in the bound Reports of the Civil Aeronautics Board. They appear in the printed Joint Appendix used in the Court of Appeals (1313a-1400a, 1469a-1497a, 1509a-1536a).

The opinion of the Court of Appeals affirming the Board's orders is reported at 271 F. 2d 752 (2d Cir. 1959).

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition of Eastern Air Lines, Inc. (Eastern) and the petition of Capitol Airways, Inc. (Capitol).

Statutes and Regulation Involved.

Involved in this case are Sections 2, 401(c) and (d), 1005(f) and 1006(a) and (e), of the Civil Aeronautics Act of 1938, as amended (52 Stat. 980, 987, 988, 1023, 49 U. S. C. §§402, 481(c) and (d), 645(f), 646(a) and (e)), and Sections 3(a), 7(c), 7(d), 8(b), 10(a), and 10(e) of the Administrative Procedure Act (60 Stat. 237, 241, 242, 243, 5 U. S. C. §§1002(a), 1006(c), 1006(d), 1007(b), 1009(a) and 1009(e)). The regulation involved is Rule 14 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings, 14 C. F. R. §302.14. All of the foregoing are printed in Appendix A hereto.

Questions Presented.

1. Is an *Ashbacker* question presented where the objecting carrier received substantially the route it had requested in a separate but concurrent route proceeding?

2. Is an *Ashbacker* question presented where there is no evidence in the record of mutual exclusivity and where the objecting carrier has not attempted to introduce evi-

dence of mutual exclusivity although offered full opportunity to do so?

3. May the Civil Aeronautics Board issue a press release announcing its tentative vote prior to issuance of its final order and opinion?

4. May members of Congress appear at public oral argument before the Board pursuant to statute and the rules of the Board?

Summary of Argument.

As grounds for granting the writ, petitioners assert that the questions presented by the instant case are important ones and petitioner Eastern also asserts that the decision below with respect to the application of this Court's decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. 327 (1945), is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit.

The importance of the questions presented rests merely on petitioners' conception of the merits of the case. The questions presented were decided in a manner fully compatible with the prior decisions of this Court. Similarly, Eastern's assertion of conflict with the Court of Appeals for the District of Columbia Circuit is not borne out by a comparison of the facts of the two cases or of the opinions of the two courts.

This case was a so-called area proceeding dealing with air service among points within a geographical area, specified by the Board, bounded by Chicago, Detroit and Buffalo on the north and Miami and Tampa on the south. A review of the procedural steps which resulted in the delineation of

the area demonstrates a course of conduct by Eastern, the purpose of which was to prevent the Board from placing a third carrier on the Miami-Chicago route. The lack of validity of those procedural maneuvers is illuminated by the absence of effort by Eastern to present evidence to support or lay the basis for *Ashbacker* claims made by it during the proceeding although offered full and ample opportunity to do so.

Eastern's assertion that the questions it presents are of such importance as to justify their consideration by the Supreme Court wholly ignores the fact that the decision of the Court below rests on absence of factual foundation for Eastern's claims rather than the presence of a fundamental legal issue. It is no denial of due process to insist that a sophisticated litigant lay a minimal basis for its asserted claims rather than toy with administrative agencies and the Courts.

Moreover, it wholly ignores the fact that Eastern has already obtained in another proceeding substantially what it claims it was denied in this proceeding, thus rendering moot Eastern's claim of prejudice. In that proceeding Eastern obtained full comparative consideration along with Northwest of the right to operate non-stop between the Twin Cities (Minneapolis/St. Paul) and Miami, and in fact received the right to operate between the Twin Cities and Miami either via Chicago and another city or via Cincinnati. The latter one-stop route is approximately the same mileage as the one-stop route resulting from the connection of Northwest's pre-existing Twin-Cities Chicago route with the Chicago-Miami route awarded it in the *Great Lakes Case*, to which Eastern here objects.

The history of the instant proceeding demonstrates, we believe, that Eastern's concern is wholly with added com-

petition on the Chicago-Miami route—not with any claimed prejudice of rights to a fair hearing with respect to a Twin Cities-Miami route.

Statement of Facts.

This matter originated as an airline route proceeding before the Civil Aeronautics Board, known as the "Great Lakes-Southeast Service Case" (CAB Docket 2396, *et al.*).

The order issued by the Board in that case granted to various carriers, including Northwest and petitioner Eastern, route extensions by amendments of their respective certificates of public convenience and necessity issued by the Board. The order also denied applications, or portions of applications, of various air carriers, including Northwest, Eastern, and petitioner Capitol.

One of the routes involved in the *Great Lakes-Southeast Service Case* is the route between Chicago and Miami. Prior to the proceeding before the Civil Aeronautics Board, this route had been the exclusive province of petitioner Eastern and Delta. The Board's decision in this case opened the Chicago-Miami market to a third carrier, Northwest.*

The proceeding began on May 25, 1955. On that day the Board issued a notice that a pre-hearing conference would be held before the hearing examiner on an application by Eastern for new route authority, Docket 2396 (R. 1), extending Eastern's routes from Washington and Charles-

* The other major routes involved in the *Great Lakes* case were one connecting Detroit with Miami, on which Delta was certificated to compete with Eastern, and one connecting Cleveland and Pittsburgh with Miami, on which Capital Airlines was certificated to compete with Eastern. Capital was also certificated to provide a new service between Buffalo and Florida.

ton, South Carolina, to Chicago and Detroit via various intermediate points.

In accordance with its usual procedure, the Board determined that it would consolidate for hearing all pending applications within a geographical area to be defined. It gave an opportunity to interested persons to be heard on the question of what scope the proceeding should take. The procedural discretion of the Board to consolidate and hear route applications in a so-called "area proceeding" was upheld by this Court in *Civil Aeronautics Board* v. *State Airlines,* 338 U. S. 572, 576-7 (1950).

From the outset, Eastern took the position that the proceeding would have to be limited strictly to the narrow area encompassed by its original application or else that a consolidated area proceeding would have to embrace Eastern's route applications covering almost the entire United States (R. 786-797). Those applications included extensions of Eastern routes

(a) from Louisville to Detroit and Buffalo;

(b) from Birmingham to New Orleans, Houston and San Antonio;

(c) from Miami to Detroit and Minneapolis/St. Paul;

(d) from Miami to Pittsburgh and Buffalo;

(e) from Chicago to New York;

(f) from New Orleans and Houston to Chicago and Detroit;

(g) from Chicago to Milwaukee, Des Moines, Cleveland, Cheyenne, Salt Lake City, Boise, Spokane, Portland and Seattle;

(h) from Chicago to Denver, Las Vegas, Los Angeles, San Diego, San Francisco, Oakland, Sacramento, Reno, Medford and Salt Lake City; and

(i) from its Miami-Tampa-Pittsburgh-Cleveland-Detroit segment to Chicago, Milwaukee, Madison, Rochester, Minneapolis/St. Paul, Billings, Spokane, Portland and Seattle.

Eastern's basis for its position was that other carriers serving certain of the above points had applications pending for authority to operate routes south and east of Chicago and that if those applications were consolidated into the proceeding, the Board was required to consolidate the far-ranging Eastern applications.

The Consolidation Order.

In its consolidation orders (R. 933-944, 1048-1053), the Board limited the scope of the proceeding to service in a generally triangular area bounded by Chicago, Detroit and Buffalo on the north, and Miami and Tampa on the south,* and rejected Eastern's request that the proceeding be expanded to include its applications for services, as the Board put it, "from the Atlantic to the Pacific via nearly every major traffic point" (R. 1052).

Eastern then amended its original application (for the fourth time) to apply for

> "any new air transportation authority sought by any other applicant pursuant to any application which may be consolidated with this application for hearing and decision whether or not that new air

* In the last consolidated area proceeding involving Great Lakes-Florida routes, decided some ten years previously, the area selected by the Board was bounded on the north and west by Chicago and Detroit, the same terminal points selected by the Board in this proceeding. *Great Lakes-Florida Service Case*, 6 C. A. B. 429 (1945).

> transportation authority is sought by a new route proposal or through a combination of a new route proposal with an existing route of said other applicant" (R. 129).

On the same day Eastern moved before the Board in the alternative that the Board (1) confine the scope of the proceeding strictly to Eastern's application Docket 2396 or to that application and similar applications; or (2) limit the proceeding by prohibiting service between points outside the area set by the Board and points within such area; or (3) consolidate for hearing in the proceeding the various other Eastern applications including the amended application referred to above (R. 972-984).

The Board denied Eastern's motions (R. 1048-1053), and Eastern filed a petition in the United States Court of Appeals for the District of Columbia Circuit for review of the Board's orders.

The Court dismissed the petition for review because of the non-finality of the consolidation order, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607, 609 (D. C. Cir. 1956).* However, the Court went on to give thorough consideration and dis-

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* The District of Columbia Circuit also dismissed substantially the same claim made by Eastern here, saying:

> "• • • Eastern says its new application [Pittsburgh-Detroit] is mutually exclusive with Northwest's Pittsburgh-Miami application, because the traffic, and so the competing service, to and from Miami is *through*, not merely to or from, Detroit. And in a very real sense this is true. But the same thing would be true of almost any new air-route segment. An application for a segment Washington-Norfolk [143 route miles apart] by a carrier which already offered service from Washington to points all over the nation, would really involve traffic between all those points and Norfolk. But competing applicants for the Norfolk segment would not for this reason be entitled to demand comparative consideration with all applicants for certificates from Washington or Norfolk to all other points and by this maneuver translate the proceeding into an examination of the entire national air-route structure. • • •"

cussion to Eastern's *Ashbacker* contentions. It said (p. 609):

> "• • • Eastern urges that, since its new applications are mutually exclusive to those of other applicants, it is entitled as of right to consolidation with them under the rule in Ashbacker. But it is quite clear that there must be some limitation to the Ashbacker rule when applied to air routes. • • • Despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the Ashbacker doctrine is not available for mere tactical maneuver purposes. An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so. We think the Board was not unreasonable in this instance."

After hearing, the Examiner found that the public convenience and necessity requires that a third carrier be authorized to operate over the Chicago-Miami route and recommended that National Airlines be selected as that third carrier. The Board, in its order of September 30, 1958, also found that a third carrier should be authorized to operate over the Chicago-Miami route and further found that Atlanta and Tampa should be intermediate points on the route. However, the Board went on to select Northwest as the third carrier. All flights of Northwest serving this route would be required to stop at Chicago.

Thereafter, Eastern filed in the Court of Appeals for the Second Circuit a petition for review and a petition for a stay of the Board's order. The stay was denied

and on October 7, 1959, the Court of Appeals issued its decision. (271 F. 2d 752.)

The Court below held that the bald assertion by Eastern of the existence of mutual exclusivity is not enough. Evidence must be introduced to support the assertion and Eastern failed to supply the deficiency. The Court said:

> "in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the Agency may treat the objection as not having been made."

This holding of the Second Circuit was in complete accord with prior decisions of the District of Columbia Circuit. See *Delta Airlines* v. *Civil Aeronautics Board,* 228 F. 2d 17 (D. C. Cir. 1955), *National Airlines* v. *Civil Aeronautics Board,* 249 F. 2d 13 (D. C. Cir. 1957).

The decision of the Court below with respect to the other contentions of Eastern and with respect to the contentions of Capitol are discussed in the Argument below.

ARGUMENT.

REASONS FOR DENYING EASTERN'S PETITION

POINT I.

The Court below correctly decided that the Board's findings were adequately stated and supported by substantial evidence.

In Point I of its brief, petitioner Eastern makes the claim that this Court should grant its petition for certiorari because the standard of "public convenience and necessity" as applied to air transportation needs clarification. Yet

Eastern fails to cite a single instance of confusion either in the Civil Aeronautics Board or in the Courts with respect to the application of this standard. The standard has been part of the Civil Aeronautics Act since its enactment in 1938 and has been applied in innumerable cases without difficulty. There appears to be no valid reason or need for the "clarification" requested.

The Civil Aeronautics Board made findings in this case, with respect to the large size and substantial growth of the Chicago-Miami market (R. 15210), the potential for continued long-term growth of that market (R. 15210), the shortcomings of the service that had been offered by petitioner and Delta Air Lines (R. 15210-15221), the fact that the passenger load factors between Miami and Chicago which had been experienced by petitioner and Delta had been so abnormally high as to cause positive doubt as to the adequacy of the service being rendered by those carriers (R. 11380, 15211-15225), and the fact that the diversionary effect of the certification of a third carrier on the Chicago-Miami route was outweighed by other factors and would not seriously impair Eastern's financial position (R. 15215, R. 15222-15223, R. 15225-15226).

The Chicago-Miami air travel market, both in terms of passengers and passenger miles, had been the largest market served by only two air carriers in the country. It was more than twice as large as the next largest two-carrier market—San Francisco-Seattle. In fact the Chicago-Miami market was larger than any other major long-haul Chicago market served by three or more carriers, including Chicago-Los Angeles, Chicago-Washington, Chicago-San Francisco and Chicago-Philadelphia (R. 15210).

The findings on size of market and inadequacy of service naturally led the Board to conclude that the additional competition which would be provided by a third

carrier was required in the public interest (R. 15222-15225).

In spite of these comprehensive findings, which are amply supported by the evidence, Eastern contends that the Civil Aeronautics Board, before certificating a new carrier on the Chicago-Miami route, was required to make "a finding weighing the size of the market against the capacity to be offered by all carriers and the cost to all of serving it" (Petition, pp. 16-17). On its face, this proposed new finding deals with the merits of the case and has no relevance to whether certiorari should or should not be granted here. Nevertheless, since the proposed finding illustrates the philosophy of Eastern's approach before the Civil Aeronautics Board and before the Courts, we believe further discussion of it is warranted.

The position of Eastern in effect is this: Added capacity results in lower load factors and thus increases expense per passenger mile; the more aircraft, the greater the expense. (The corollary of this is that Eastern has kept profits up and costs down by providing less than adequate capacity). Now that it faces competition, Eastern has said that it is willing to supply whatever additional aircraft are required on the route. However, says Eastern, the Board must make a finding as to the total capacity which all carriers will afford and the resulting expense to all carriers before placing on the route additional capacity from any airline other than Eastern and Delta. But since Eastern has said that it alone is prepared to supply all the capacity the route requires, any added capacity automatically produces an uneconomic result. Thus, no additional carrier could ever be certificated on the route if Eastern's view were to prevail. Eastern's premise now becomes apparent. It is simply this: A carrier enjoying a

monopolistic position on a heavily traveled route should be protected from competition forever.

The stated Congressional intent is to encourage competition in the establishment of a nationwide airlines system, not to protect monopoly (see Section 2(d) of the Civil Aeronautics Act, 49 U. S. C. §402(d)).

The determination of the need for an additional carrier when the Board has made findings as to the size of the market, the adequacy of past service and the other matters above set forth is one falling peculiarly within the expert knowledge of the agency concerned.

Notwithstanding Eastern's insistence that the Board should make a finding which requires a forecast of the capacity to be offered by all carriers and the cost to them, Eastern made no showing of the diversion of traffic and financial effect which it might suffer if a third carrier were added to the route. To the contrary, at the hearing, its witness declined to sponsor (i.e., swear to the underlying assumptions) an exhibit prepared by Eastern estimating the revenue diversions that it would experience and the exhibit was therefore excluded from the record (R. 1502-1522).

We have been unable to find any justification for the new and complex finding sought by Eastern either in applicable statutes or in prior decisions of this or any other court.* To the contrary, this Court, in *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 96-97 (1953), refused to require a comparable finding:

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* The decision of the Board here was supported by substantial evidence, and no element of abuse or unfairness as to the Board's findings has been urged by Eastern which could be deemed sufficient to set aside the Board's determination in this specialized area. See *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535-536 (1946); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

"In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States,* 342 U. S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, *cf. Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 348 * * *."

POINT II.

The decision of the Court below with respect to the application of the *Ashbacker* doctrine is correct and does not conflict with the decision of the Court of Appeals for the District of Columbia Circuit.

Eastern urges, as an additional reason for granting its petition for certiorari herein, that the Civil Aeronautics Board and the courts have been confused with respect to the application of this Court's decision in the *Ashbacker* case and that the "courts have struggled with the application of *Ashbacker* to air route cases for over ten years . . ." While we do not agree with this contention, it has no application to the decision of the Court below since the question of applying the *Ashbacker* doctrine is not presented on the facts of record in this case.

For the same reason, we do not agree with Eastern's contention that certiorari be granted because of a "conflict" between the decision of the Court below and the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board* (Pet., Appendix C) in the application of Ashbacker.

We believe that the cases are entirely consistent and that the Court of Appeals for the District of Columbia would have decided the *Great Lakes Case* in the same way as did the Court of Appeals for the Second Circuit.

In the one case (the *St. Louis-Southeast Service Case*) a prima facie indication of mutual exclusivity had been established. In the other case (the *Great Lakes Case*) it had not.

The *Ashbacker* Doctrine.

Ashbacker arose under the Federal Communications Act and involved applications for a single radio frequency. The FCC itself found that simultaneous operation over two stations on this frequency was physically impossible and that the two applications were mutually exclusive. Nevertheless, the Commission granted one of the applications prior to hearing the other application. This Court held the Commission's action to be improper.

All *Ashbacker* held was that where there are two mutually exclusive *bona fide* applications for a license, "the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." [326 U. S. 327, 333] This is no more than a requirement of fair hearing.

The *Ashbacker* Doctrine Has No Application To This Proceeding.

A.

Eastern's entire argument that the Civil Aeronautics Board did not comply with the *Ashbacker* doctrine is predicated upon its claim that its application for authority to operate between the Twin Cities and Florida by way of Chicago (Docket No. 3207) should have been consolidated with the *Great Lakes-Southeast Service Case.*

Eastern's petition (pp. 13 *et seq.*) discloses no injury flowing from the asserted failure to apply the *Ashbacker* doctrine, nor does it specify the relief* which it seeks.

The fact is that Eastern has suffered no injury since, in another proceeding decided during the pendency of the case below, the *Chicago-Milwaukee-Twin Cities* case, Docket 3207, *et al.;* Order No. E-13890 (May 19, 1959), Eastern has already been awarded a route comparable with the route resulting from the connection of the Chicago-Miami route awarded to Northwest in the *Great Lakes* case with its pre-existing Twin Cities-Chicago authority. In addition, Eastern received in the *Chicago-Milwaukee-Twin-Cities* case full comparative consideration on its application for a non-stop route between the Twin Cities and Miami.

In the Chicago-Milwaukee-Twin Cities proceeding Eastern was awarded two routes to Miami from the Twin Cities, one via Chicago with a stop at an intermediate point between

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* In the *St. Louis-Southeast Service* case, with which Eastern alleges the decision below is in conflict, the relief granted was a remand to the Civil Aeronautics Board for action by it consistent with the opinion in that case, i. e., the imposition of a condition which would prevent single plane service (such as a required change of planes at St. Louis) pending a hearing on mutual exclusivity.

Chicago and Miami, and one via Cincinnati.* Eastern also received a route between Chicago and Milwaukee and the Twin Cities, with a restriction as to long-haul service. In this same proceeding Northwest was awarded a non-stop Twin Cities-Miami route.

In view of the grant to Eastern of two routes to Miami from the Twin Cities and the opportunity given it of full comparative consideration as to whether it should be the non-stop carrier on the route, there is no relief which can be granted to it in this proceeding which would improve its position with respect to the Twin Cities-Miami application.** The Board's action in the *Twin Cities* case demonstrates that economic mutual exclusivity could not have been shown by Eastern in the instant proceeding, and explains Eastern's failure to produce evidence on the question although its right to do so was explicitly affirmed by the Examiner during the hearing (R. 2623-6).

B.

There is no conflict between the decision of the Court below and that of the Court of Appeals for the District of Columbia Circuit, since the facts in the case below did not raise for consideration any question of application of the *Ashbacker* doctrine. Instead, the decision below rests on the failure of Eastern to make any showing of mutual exclusivity although afforded an ample opportunity to do so. In the decision rendered by the Court of Appeals for the

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* The air mileage distance between the Twin Cities and Miami via Cincinnati is 1,552 miles compared with 1,531 miles via Chicago.

** There does not appear to be any requirement that under *Ashbacker* the comparative consideration be afforded in the same hearing. See *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Western Airlines* v. *CAB*, 184 F. 2d 545 (9th Cir. 1950).

District of Columbia Circuit the evidence supported and the decision held that a *prima facie* indication of mutual exclusivity had been established.

The Court of Appeals for the District of Columbia Circuit had before it a case in which the Civil Aeronautics Board had itself made findings which established the *prima facie* case of mutual exclusivity necessary to invoke the *Ashbacker* doctrine. Thus, the Court said (Pet., Appendix C10, C11):

> "So the first debated question is whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.
>
> "In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.
>
> "In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National. A year later the Board, without further hearings, authorized a competitive interchange service.

This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing. The Board then found that the proposed new service would be hopelessly uneconomic and denied the certificate. One finding of the Board was that:

> '• • • the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami.'

"The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions. Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services."*

Thus, the District of Columbia Circuit was faced with the same question which this Court had before it in *Ash-*

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* Eastern suggests that it made precisely the same showing before the Board in the *St. Louis-Southeast Service* Case as it did in the *Great Lakes* case (Petition, p. 21). But in the *St. Louis-Southeast Service* Case Eastern had the benefit of the evidence introduced by American Airlines and of findings in recent prior proceedings of the Board. The Court there said in respect of Eastern's transcontinental service:

> "Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants for transcontinental certificates, discussed by us in I *supra.*" (Appendix C18)

And again in a footnote, referring to the case of *Delta Airlines* v. *Civil Aeronautics Board*, 228 F. 2d 17 (D. C. Cir. 1955), the Court said that the reasoning of the *Delta Airlines* case "requires the same kind of hearing in a case such as this [*i. e., Eastern*], where a *prima facie* showing is made of mutual exclusivity . . ."

The Court's finding in "I *supra*" quoted in the text above, pages 20-21, was that, based upon the evidence submitted by American and prior proceedings, a *prima facie* case had been established indicating that the transcontinental route was mutually exclusive with that granted to TWA.

There was nothing comparable in the *Great Lakes* case.

backer and its decision was the same, that is, that where the administrative body itself had made findings indicating that two applications were mutually exclusive, one application could not be granted without affording a hearing to the loser.

In the instant case this *prima facie* indication of economic mutual exclusivity is not present. The findings referred to by the District of Columbia Circuit do not appear in this record and Eastern did not attempt to make up the deficiency by introducing evidence showing economic mutual exclusivity. The absence of such proof here was the reason why the Court below held that the Board's procedure in this case did not violate the *Ashbacker* doctrine:

> "On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB,* 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none. This failure to make any showing of mutual exclusivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where

an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made." (Pet., Appendix B5, B6)

C.

A further distinction between the two cases is that in the *St. Louis Southeast Service Case* the Board, after first indicating that it was not going to consider questions relating to the southern transcontinental route in fact, according to the District of Columbia Circuit Court, transformed the nature of the proceeding and treated the case as if it were a transcontinental case, basing its award to TWA on the benefits afforded by the alternative transcontinental service which it could provide (Pet., Appendix C14).

D.

We suggest that the Circuit Court for the District of Columbia would have reached the same decision in the *Great Lakes* case as did the Court below. That Court was familiar with the earlier proceedings in this case. Yet, in the *Southeast Service* case, that Court did not disapprove its earlier decision dealing with Eastern's first attempt to invoke the *Ashbacker* doctrine in this proceeding (*Eastern Airlines* v. *CAB,* 243 F. 2d 607 (1956)). Indeed, the Circuit Court for the District of Columbia in the *Southeast Service* case cited that earlier decision in support of the right of the Civil Aeronautics Board to fix an appropriate area (Pet., Appendix C7).

Moreover, at the time the Court of Appeals for the District of Columbia Circuit deliberated on the Southeast Service case (Delta Air Lines) it had before it the decision

of the Court below.* Had there been any necessity for the Circuit Court of the District of Columbia either to disagree with or distinguish the decision of the Court below, it had full opportunity to do so. We submit that it is of significance on the question of conflict that it did not do so, and that, indeed, an inference is proper that it found no necessity to do so since the cases were not only reconcilable but in accord.

POINT III.

The Board's press release announcement did not result in a prejudgment of the case.

Petitioner Eastern, in its Point III, contends that the Board's issuance of a press release announcement of its tentative vote makes its final order and opinion invalid.**

Eastern's attack on the Board's press release is premised on the dual contention that the tentative vote, announcement of which was released to the press, was made "prior to consideration of all the evidence" and that the final order was based upon "data which were not even

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* The Board filed the decision of the Court below, which was rendered October 6, 1959, with the District of Columbia Circuit approximately two months prior to the issuance of its decision on December 10, 1959.

** Eastern has not, either in its petition to this Court or in the Court below, referred to any decision in which a claim of bias or prejudice has been made as a result of post-hearing statements. Nor can a tentative vote, carefully and fairly reached after consideration of the facts and the law, at all be considered the equivalent of pre-hearing remarks tinged with bias or prejudice, as in *Gilligan, Will & Co.* v. *SEC*, 267 F. 2d 461 (2d Cir. 1959), cited by Eastern.

Courts have uniformly refused to "probe the mental processes of the Board", even where statements were made prior to hearing which indicated a pre-judgment by the administrative body. See *United States* v. *Morgan*, 313 U. S. 409 (1941); *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219, 236 (1947); *Lumber Mutual Casualty Insurance Co.* v. *Locke*, 60 F. 2d 35, 38 (2nd Cir. 1932).

in existence at the time of its press release." These are both factual questions specifically presented to the Court below on petition for rehearing and rejected by it. Eastern has no basis for the former position and is simply wrong on the facts as to the latter.

The Voting Results Were Announced Only After Full Hearing and Consideration Were Given to the Issues in the Proceeding.

The issuance of the press release by the Board was preceded in this case (as in other Board proceedings in which the so-called press release procedure is utilized) by all the procedural steps provided for in the Civil Aeronautics Act and in the Administrative Procedure Act to insure a fair hearing.*

The two press releases announcing the Board's tentative votes (R. 15118-15124, App. 1275a-1281a) were issued on March 26 and March 31, 1958, approximately two months after oral argument before the Board on January 28-30. During this two month period the Board had the matter under advisement. Indeed, the initial decision of the Examiner had been submitted to the Board on November 5, 1957, or five months earlier. Moreover, the tentative decisions were released only after a series of meetings of Board members and certain of their staff assistants at which the route authorizations were discussed and votes taken. These meetings took place on March 19, 25, 26 and 27, 1958 (App. 1571a-1585a).

It is only an exercise in imagination to say, as Eastern does, that there was no consideration of the evidence in the

* Those steps included conference, exceptions and exchange of evidentiary exhibits before hearing; evidentiary hearings before an Examiner lasting seven weeks; filing of briefs to the Examiner; the Examiner's initial decision; exceptions thereto; filing of briefs to the Board; oral argument before the Board; conferences by the Board and staff assistants and tentative votes on the awards.

record prior to the tentative vote or that Eastern was denied due process.

The Board's Tentative Vote on Route Authorizations Was not its Final Order and Decision.

Both releases explicitly stated:

> "This announcement does not constitute the Board's decision in these cases which will be entered and issued at a later date."

Following the issuance of the press releases, the process of preparing the Board's opinion and final order was undertaken, and the Board rendered its final decision on September 30, 1958.

The Board does not feel itself bound by its press release announcements if, during the course of preparing its opinion and final order in a proceeding, it wishes to change its earlier vote.

For example, in the *Seven States Area Case,* Order No. E-13254 (1958) where the Board had announced by press release its tentative vote to award a route to Ozark Airlines, in its final decision the Board awarded the route instead to North Central Airlines.

Indeed, even a final order is subject to reconsideration, and the Board does not hesitate to make a change where it desires to do so. Thus, in the *Chicago-Milwaukee-Twin Cities Service Case,* Docket 3207, *et al.,* the Board issued a press release (December 5, 1958) and at a later point a final order (Order No. E-13890, May 19, 1959) extending Eastern's existing route between Southeastern cities and Chicago beyond Chicago to Milwaukee and the Twin Cities, with a three-stop restriction on all flights originating or terminating south of Chicago. In its order on reconsideration (Order No. E-14443, September 15, 1959) the Board changed this to a one-stop restriction on flights which by-pass

Chicago via Cincinnati and a two-stop restriction on flights via Chicago.

The final order of the Board was based on material facts in the record at the time of the press release announcements and properly referred to additional facts stipulated in the record.

Eastern contends that the 1957 air traffic data referred to by the Board in its Order No. E-13024, dated September 29, 1958, was "not even in existence" at the time of the press releases in March 1958 (p. 23 Eastern's Petition). This contention is at variance with the facts. Moreover, it ignores Eastern's specific agreement allowing the Board to utilize post-hearing data.

Eastern had stipulated that this and other pertinent factual data issued by or submitted to the Board up to the date of its final decision would be a part of the record, and thus waived any right to object to the use by the Board of all this data (R. 16025 E-F, 3420-1).

The September 1957 air traffic surveys were *published* in the summer of 1958, *prior* to the final order of the Board. They are clearly within the terms of the stipulation.

The September 1957 traffic data for the Chicago-Miami market were clearly available to the Board and to the parties to this proceeding well prior to March 1958 when the press releases were issued. Northwest in fact referred to material for the September 1957 survey period, contained in reports submitted to the Board *by Eastern and Delta,* in Northwest's January 13, 1958 brief to the Board, two weeks prior to oral argument in this case and more than two months prior to the Board's press releases.

Even without regard to the stipulation referred to above and excluding the post-hearing data referred to in the Board's order, the Board had more than "substantial

evidence" before it in support of its decisions. See §10(e) of the Administrative Procedure Act, 5 U. S. C. §1009(e); *NLRB* v. *Stow Mfg. Co.*, 217 F. 2d 900, 905 (2d Cir. 1954), *cert. denied*, 348 U. S. 964 (1955). Thus, Eastern has not demonstrated that it was prejudiced by any reference by the Board to alleged post-press release data.

Indeed, the 1957 figures reflected in the Board's opinion and referred to by Eastern were not significantly different from those for 1956. They merely served to show that basic trends indicated by the 1953-56 data introduced at the hearing continued to the most recent date for which figures were available to the Board.*

The Board in referring to 1958 traffic in its supplemental opinion was answering Eastern's contention on petition for reconsideration that 1958 traffic data seriously reversed prior trends (R. 15990-2, App. 1472a-1473a).

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* Thus, at R. 15210 the growth in the Chicago-Miami market was shown to be from 180,817 in 1953 to 304,837 in 1956, with a further small increase to 313,001 in 1957. Similarly, at R. 15211 the Tampa-St. Petersburg-Chicago passengers were shown to have increased from 31,629 in 1953 to 72,215 in 1956 with a further small increase to 74,464 in 1957. Similarly, Atlanta-Chicago passengers were shown to have increased from 37,323 in 1953 to 50,466 in 1956 with a further small increase to 52,767 in 1957.

REASONS FOR DENYING CAPITOL'S PETITION

POINT I.

The Court below correctly decided that "the findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence."

Petitioner Capitol, in its Point I, misconstrues the opinion of the Court below to hold that *"no findings whatsoever are necessary"* where the Board denies a route application, and then assigns this as a reason for this Court to grant the writ of certiorari. (Capitol Petition, page 5)

The Court below actually stated that

> "where one of competitive applications is held preferable to the others from the standpoint of public interest, no *further* findings with respect to the unsuccessful applicants is required." (271 F. 2d at 760) (Emphasis added)

It is apparent that the Court did not hold that comparative findings were unnecessary and, in fact, comparative findings were made by the Board on the numerous applications. The Court believed that no "further" findings were called for and cited a case holding just that. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831.

After making the above quoted statement, the Court below went on to *hold* that

> "The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence." (271 F. 2d at 760)

Of the seven carrier applicants for the Chicago-Miami route, the Board, on carefully stated grounds, ultimately selected Northwest. None of the unsuccessful applicants other than Capitol has challenged the selection of Northwest.

The Board squarely met any applicable requirements of *Schaffer Transportation Company* v. *U. S.*, 355 U. S. 83 (1957), cited by Capitol (Petition, page 6), and the holding of the Court below is consistent with that case. In *Schaffer*, this Court stated that where the ICC decided not to authorize a new service and denied the one application to provide such service, it must set forth its reasons for so deciding. Here, the CAB decided to authorize additional service between Chicago and Miami and granted one of seven applications to provide such service. The Board and the Examiner (whose findings the Board adopted) set forth comprehensively and clearly its reasons for authorizing additional service and for preferring Northwest from among the seven applicants, of which Capitol was one.

POINT II.

The Court below correctly decided that the appearance of members of Congress at public oral argument before the Board, in accordance with the published rules and established practice of the Board, was not improper and violated no rights of Capitol.

Petitioner Capitol, in its Point II, claims that it was denied a fair hearing by reason of the appearance of members of Congress who made statements at the public oral argument before the Board in this case and who, in some instances, submitted statements in writing and telegrams at

the oral argument to be placed on the record. Because several of the statements of the various members of Congress or persons speaking for them supported additional service to the communities which they represented that would result from certification of Northwest, Capitol claims that the agency's "judicial character" was violated by "political influence". Capitol also asserts that these appearances were "without prior notice" to it.

Members of Congress Appeared Openly for a Proper Purpose in This Proceeding.

There is no suggestion or claim by Capitol that there was any tampering with members of the Board by Congressmen or any other person acting on behalf of Northwest. The only point of contact complained of by Capitol between members of Congress and members of the Board took place at public oral argument on the record.*

Accordingly, there is no basis for applying in this case recent decisions cited by Capitol which deal with covert, *ex parte* contacts with members of the Federal Communications Commission.**

In this proceeding various members of Congress or persons speaking for them, together with similar appearances on behalf of states or their aeronautics commissions, pre-

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* As the Court below held, whether or not Northwest contacted Congressmen is immaterial; the only pertinent question is whether members of Congress or others contacted members of the Board in an improper manner. There is not the slightest indication in this case of any contact between members of Congress or others with members of the Board other than at public sessions of the Board on the record, and Capitol makes no claim to the contrary.

** *Sangamon Valley Television Corp.* v. *United States*, 358 U. S. 49 (1958), remanded, 269 F. 2d 221 (D. C. Cir. 1959); *WIRL Television Corp.* v. *United States*, 359 U. S. 51 (1958) and *WORZ Inc.* v. *FCC*, 358 U. S. 55 (1958), remanded, 268 F. 2d 889 (D. C. Cir. 1959).

sented statements at the oral argument. Persons so appearing urged the general interest of their localities in obtaining new air service and some members of Congress from areas served only by Northwest supported Northwest's certification.

A reading of the statements will disclose that the presentations were entirely reasonable ones in furtherance of representing the general interests of their constituents. (R. 14530-74, 14712-16, 14729-30, 14806-09, 14775-77, 14904-07, 14993-99, 15007-12, 15012-17, 15019-23, 15025-26).

Presentation Of Oral Argument By Representatives Of The Legislative Branch Of The Government Was Specifically Permitted by Board Regulations.

The Board conducts its certification proceedings pursuant to Section 401 of the Civil Aeronautics Act. Section 401(c) provides that

> "any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate."

Pursuant to this Section the Board has adopted in its Rules of Practice in Economic Proceedings, Rule 14 which provides:

> "Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in any enforcement proceeding, and present any evidence which is relevant to the issues. • • • In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned" (14 C. F. R. §302.14).

In view of the Board's published rules and the common practice, which had naturally followed, Capitol could not have been "surprised" at the appearance of members of Congress in this proceeding.

The Board's rule avoids *ex parte* presentations and covert influence and encourages open statements on the record. As argument, those statements are not regarded or treated by the Board as evidence.

Section 300.2 of the Board's Procedural Regulations, cited by Capitol (Petition, p. 14), prohibits private communications and off-the-record efforts to bring pressure or influence to bear upon the members of the Board of its staff, and emphasizes the judicial character of the Board's proceedings. This section clearly has no application to arguments made upon the record specifically permitted by Section 302.14 of the Board's Procedural Regulations (quoted above). There was no failure by the agency to follow its prescribed procedure as was involved in *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), or *Service* v. *Dulles*, 354 U. S. 363 (1957), cited by Capitol.

We suggest that the Board's rules and any amendments thereto with respect to persons permitted to appear at hearings or oral arguments are a matter for the administrative agency concerned or for Congress, and that no justiciable right of a participant in Board proceedings has been violated by the appearance of representatives of the legislative branch of the Government.

Capitol Made No Claim Before the Board That The Congressional Appearances were Improper.

Capitol made no objection before the Board to any of the statements by members of Congress of which it now complains, nor did it suggest that the Congressional repre-

sentations were prejudicial or raised any new factual or legal questions requiring an opportunity to reply.* Capitol first raised this claim before the Court of Appeals below. Consequently, the sole contention of Capitol made in its petition to this Court is barred from consideration under Section 1006(e) of the Civil Aeronautics Act, 49 U. S. C. §646(e). That section precludes consideration by a reviewing court of matters not urged to the Board unless there were reasonable grounds for the failure to do so. Capitol here alleges no such grounds, nor are there any. Hence, its claim should be barred. See *United States* v. *Tucker Truck Lines*, 344 U. S. 33 (1952); *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (D. C. Cir. 1950).

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* In its petition for reconsideration, filed ten months after the oral argument, the only contention made by Capitol was that the statements by Congressmen had the effect of extending the time allotted Northwest for oral argument (R. 15292-15295). In this connection Capitol's reference to its "unsuccessful request for additional time for argument" (Pet., pp. 3, 13) was not related to the appearance of Congressmen at the oral argument. Capitol's request was made prior to oral argument at the same time that the Chief Examiner assigned time for argument by the parties. Every other applicant party made a similar request for additional time and every applicant's request, including that of Capitol, was denied by the Board. Capitol's and the other carriers' requests, and the Board's denial of the requests, were made without reference to the appearance of Congressmen at the oral argument. Capitol did not renew its request for additional time and, as stated, objected to the Board's allocation of time only when it filed its petition for reconsideration ten months after oral argument.

Conclusion.

For the foregoing reasons, we respectfully submit that the petitions of Eastern and Capitol for writs of certiorari should be denied.

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April 11, 1960.

CERTIFICATE OF SERVICE

I, C. Frank Reavis, attorney for Northwest Airlines, Inc., and a member of the bar of the Supreme Court of the United States, hereby certify that on April 11, 1960 I served a copy of the foregoing Brief in Opposition to Petitions for Writ of Certiorari upon the persons listed below, by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

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APPENDIX A

Statutes Involved

Civil Aeronautics Act of 1938 as amended, 52 Stat. 977, formerly 49 U. S. C. A. §401, now 49 U. S. C. A. §1301:

Section 2:

DECLARATION OF POLICY

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transporation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

(52 Stat. 980, formerly 49 U. S. C. A. §402, now 49 U. S. C. A. §1302; subsections (e) and (f), not pertinent here, have been slightly modified)

Section 401 (c):

NOTICE OF APPLICATION

Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Section 401 (d) (1):

ISSUANCE OF CERTIFICATE

The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(52 Stat. 987, formerly 49 U. S. C. A. §481 (c) and (d) (1), now 49 U. S. C. A. §1371 (c) and (d) (1))

Section 1005(f):

FORM AND SERVICE OF ORDERS.

Every order of the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

(52 Stat. 1023, formerly 49 U. S. C. A. §645(f), now 49 U. S. C. A. §1485(f)).

Section 1006:

ORDERS OF BOARD SUBJECT TO REVIEW.

(a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the peitition theretofore.

(52 Stat. 1024, 63 Stat. 107, formerly 49 U. S. C. A. §646(a), now 49 U. S. C. A. §1486(a)).

FINDINGS OF FACT BY BOARD CONCLUSIVE.

(e) The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(52 Stat. 1024, formerly 49 U. S. C. A. §646(e), now 49 U. S. C. A. §1486(e)).

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. A. §1001:

Section 8:

In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

(60 Stat. 242, 5 U. S. C. A. §1007(b))

Section 10(a):

RIGHTS OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(60 Stat. 243, 5 U. S. C. A. §1009(a))

Section 10(e):

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(60 Stat. 243, 5 U. S. C. A. §1009(e))

Civil Aeronautics Board Rules of Practice in Economic Proceedings, 14 C. F. R. §302.14:

§302.14 *Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on

the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned. [§302.14 as amended by Amendment No. 2, effective August 1, 1952, 17 F. R. 7040; Amendment No. 7, effective May 1, 1953, 18 F. R. 2666.]